BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

1.

The District Court's opinion will be found in the Record at pp. 234, 244, and in 29 Federal Supp. 598. The opinion of the United States Circuit Court of Appeals was rendered on July 9, 1940, affirming judgment of District Court in favor of the United States against Continental Casualty Company, for $26,744.70, with legal interest at 5% from October, 1935. See Record, pp. 273, 278, and 113 Federal (2nd) 284.

2.

Petition and supporting brief for rehearing was filed July 26, 1940.

3.

Order denying rehearing was entered August 2, 1940.

4.

Motion and Order staying Mandate was filed August 6, 1940, and Mandate stayed 45 days.

5.

JURISDICTION.

A petition for review on Writ of Certiorari of a decision of a Circuit Court of Appeals is authorized by Title 28, paragraph 347, U. S. Code (Judicial Code §240) amended. Supreme Court Rule 38.

6.

The foregoing petition sets forth, we believe correctly and succinctly the issues in the case and the errors of law of the Court of Appeals, which require reversal.

7.

In order to clearly appreciate the *fundamental* errors of law committed by the Honorable Court of Appeals, it is necessary to understand:

8.

That counsel for the United States and the surety *stipulated the facts* on which, jury being waived, this case was to be tried. (Stipulation, R. 52-53-54-55-56-57) as follows:

> "It is stipulated and agreed between counsel for the United States and counsel for the Continental Casualty Company that this cause *shall be tried* on the following *agreed facts*, together with such additional facts and evidence as either party may desire to offer and produce."

And then *because* the United States had *misstated* the *exact facts in XI* of the petition the *United States Attorney agreed:*

9.

> "In relation to Art. XI of the petition, it is admitted that notice of default was served on the Continental Casualty Company on March 17, 1934, but the plaintiff shall offer said notice and *produce* and *file* the *letters which followed* and passed between the Engineers and P. M. Milner, attorney of the Continental Casualty Co.
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> March 17, 1934, notice of default.
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> March 17, 1934, Lt. Col. Hodges' letter to Continental Casualty Co., asking if it desired to complete the work. (R. 59-60).
>
> Telegram and letter of Continental dated March 22, 1934, agreeing to complete the work. (R.

61-62), *provided necessary steps to annul contract had been taken.*

March 26, 1934, letter of Lt. Col. Hodges *clearing up misunderstanding.* (R. 63-64).

March 28, 1934 (R. 64-65). Letter of surety saying: 'From the information we have here this *letter would seem to be a sufficient termination of the contract' * * * We are moving as rapidly as we can with reference to arranging for completion of this contract.*"

With all due respect to the Honorable Court of Appeals, Fifth Circuit, how can it justify predicating its conclusion of law that there was no agreement with the surety to complete the contract upon only the telegram and letter of March 22, 1934, unless by ignoring the subsequent letters of March 26, 1934, and March 28, 1934?

If there had been no further correspondence than Lt. Col. Hodges' letter of March 17, 1934, and the surety's telegram and letter of March 22, 1934, of course there was confusion there and *no meeting of minds*—and this was brought about by Col. Hodges' neglect to send the surety on March 17, copy of his letter to Grasser Contracting Company "terminating its right to proceed." Had he done so there never would have been any confusion.

But the Court of Appeals by grievous, reversible error, ignores the fact that the misunderstanding was *immediately corrected by Col. Hodges' letter of March 26, 1934* (R. 63-64) and surety's reply and acceptance March 28, 1934, (64 and 65) and *strange to say* the Court likewise ignores Col. Hodges' letter of March 31, 1934, to Receiver Landry (R. 66 [d] and [e] and Col. Hodges' let-

ter to P. M. Milner April 3, 1934 (68-69) conceding an agreement *had been reached and made.* May we ask how can a Court ignore these *stipulated facts* and immediate correction of a misunderstanding and propound so palpable and reversible error of law on the fundamental issue in the case, as to declare there was no mutual understanding?

Now unquestionably a valid legal contract was made by the United States with the Continental Casualty Co. to complete the work for 8 cents a cubic yard—at which the United States could suffer not one penny of damages.

This being unquestionably sound, our Point 4 leads us to say that this contract being made, valid and legal, instead of ignoring it, Col. Hodges illegally advertised and entered into contract with Cralan, Inc., at an excess cost of .0289 cents per cubic yard or $28,963.72. Had the United States been properly advised it should have sued the Continental Casualty Co. for *specific performance* of agreement made with it. This would have brought up the issue to the court. The surety would have answered that it was ready and willing to complete the work according to contract—and the Court would have decided that the United States should pay the surety 8 cents per cubic yard *on monthly progress payments* and we would have never had this outrageous unjust suit, and the United States would never have suffered 5 cents damages.

But no, being poorly advised, the United States ignored its contract and illegally relet the work to Cralan & Co., Inc., and now wrongfully attempts to mulct a surety, anxious, ready and willing to perform its obligation to the

United States, with damages, $28,963.72, a most unconscionable suit.

This brings us to 14, Point 1, where grantee prevents performance, the grantor is excused from performing as decided by this Honorable Court.

To hold the surety liable for this excess would be unconscionable and violative of principles set forth by the Supreme Court of the United States in the case of *United States v. United Engineering Co.*, 234 U. S. 236.

The Supreme Court said:

> "In Dodd vs. Churtion, L. R. 1 Q. B. 1897, 562, 568, CHITTY, J., said: 'The law on the subject is well settled. The case of Holmes vs. Guffy (3 M. & W. 381, and the subsequent cases in which that decision has been followed are merely examples of the well known principle stated in Comyrs Digest Condition L (6) that (emphasis ours) *where performance* of a *condition* has been *rendered impossible* by the *act* of the *grantee* himself, the *grantor is exonerated* from performance of it. The law on the subject was very neatly put by BYLES, J., in Russell v. Bandeira (13 C. B. ... N. S. 149. *This principle* is *applicable not to building contracts only*, but to *all contracts*. If a man agrees to do something by a particular date or in default to pay a sum of money as liquidated damages the other party to the contract must not do anything to prevent him from doing the thing contracted for within the specified time. This fact (the difficulty of proving actual damages, if such it be, would not permit the Government by its own fault to prevent the performance of the contract and do that which amounts to a waiver of the stipulation and then *insist on it as a rule of damages.*"

The Court of Appeals declares Col. Hodges' action was in nature of laches or negligence for which the United States is not bound. Conceding the contract made with the surety was valid, legal and binding, his act was *repudiation* and spoliation as we set forth by Your Honors' decisions, Page 7, 14, Point 2, of our petition.

It would be a useless task to point out the remarkable errors of statement made by the Court of Appeals. Court says, p. 4 of opinion:

> "Appellant occupies unusual position. It predicated its agreement to take over and complete the work upon the condition that the contract be absolutely cancelled."

True this proviso was in telegram and letter of March 22, 1934; the Court grievously errs when it says we predicated our averment to take over the work on this telegram and letter which is not true as the Court deliberately ignores the rest of the correspondence of Col. Hodges and surety *correcting this misunderstanding* not only coming to a *mutual understanding* but deliberately ignoring Col. Hodges' admission on March 31, 1934, and April 3, 1934, that the surety had

> "signified its desire to complete work in accordance with the terms of the contract"

and

> "has signified its intention to complete the work in accordance with the terms of the contract."

Finally the allowance of the item of government area and district overhead, $14,399.87, was never analyzed by the Court, despite the bitter fight we put up against this unconscionable *bookkeeping percentage charge* of the gov-

ernment against its divisions over the United States. Such a charge could at best, only be made where the government takes over the equipment and the job and completes the work itself.

Your Honors advise us to be brief but it is impossible in justice to our client and Your Honors, not to fully analyze what we consider the error of the Court of Appeals in simply ignoring this point and in bluntly and unfairly saying, without rhyme or reason, that the government's claims have been proven. Please bear with us and prevent a miscarriage of justice.

In the statement which is embodied in the petition and on which the judgment rendered in this case is based (R. 13-18), the defendant is charged with "Government Cost", which is composed of two items, "Job Overhead" and "Area, District and Division Overhead", and amounts to $14,399.87, detailed as follows:

Picayuneville-Waterloo Levee, Item R805-A:		
Job Overhead	$6,769.12	
Area, District, and Division Overhead	4,825.18	$11,594.30
Picayuneville-Waterloo Levee, Item R-805-B:		
Job Overhead	697.27	
Area, District, and Division Overhead	833.48	1,530.75
Dicharry Levee, Item L-891:		
Job Overhead	731.94	
Area, District, and Division Overhead	542.88	1,274.82
Total		$14,399.87

The "Job Overhead", it appears, (R. 177), consists merely of the cost of inspection, supervision, etc., charged to the particular job. The basis of this suit, however, (and, of course, the *only* basis upon which it could be filed), is that the work as completed by Cralan, Inc., cost the Government *more* by so much than it would have cost had it been completed by the Grasser Contracting Company, the main item being the difference between the cost of placing the number of cubic yards still to be put in position when Grasser defaulted at the price paid to Cralan and the cost of placing said yardage at the price specified in Grasser's contract.

The Government would, however, have been compelled to bear this "Job Overhead" had Grasser completed the work and there is absolutely nothing in the record to show that it amounted to any greater sum with Cralan doing the job than it would have with Grasser nor is it reasonable to suppose that it cost any more to supervise and inspect Cralan's work than it would have to supervise and inspect Grasser's.

This item, therefore, does not constitute any part of the *increased* cost of having the job completed by Cralan but is part of the Government's proper and normal share of the expense of having the work done and would, *in both cases*, have had to be borne by the Government. In the absence of evidence to the contrary, it is to be presumed that it would have run the same in both instances.

If the foregoing item "Job Overhead," cannot properly be included in the amount chargeable to Grasser's surety as the increased cost of completing the work, still

less can the "Area, District, and Division Overhead". This is not composed of any definite items specifically chargeable, in *any* sense, to this particular job, but is merely a proportion of the cost of operating the Government's offices in the division in whose jurisdiction the job was done and represents merely a percentage chargeable to this particular job *purely as a matter of government accounting.* It is merely a question of apportioning the Government's *own* expense of operating its *own* offices among all the jobs done in the division *solely as a matter of bookkeeping.*

It was thus not an outlay that was incurred as the result of having the work finished by Cralan or one that would not have been incurred if Grasser had finished it. The expenditure the Government made for maintaining its offices was exactly the same with Cralan taking over the work as it would have been with Grasser handling it to its completion and, although the Government may allocate its overhead among the various jobs handled in the division in proportion to the contract cost of the jobs and would thus impute a greater proportion of said overhead to the job with Cralan completing it than with Grasser completing it because the contract cost of completion was greater with Cralan than it would have been with Grasser, the Government has no right whatsoever to foist this purely factitious bookkeeping increase upon Grasser's surety.

Let us see just what are the items composing this "Area, District, and Division Overhead". They are given by the witness LaCroix on Pages 193 and 194 of the record and are as follows:

> Salaries of officers, engineers, and draftsmen of the district and division whose duties are of a

general nature and of the administrative and clerical force of the district and division offices.

Rent, light, and heat of the district and division offices.

Depreciation and maintenance of buildings and upkeep of grounds of the district and division offices.

Depreciation and upkeep of office equipment of the district and division offices.

Office supplies used in the district and division offices.

Cost of general inspections which cannot be allocated to specific jobs.

Telephone and telegraph charges which cannot be allocated to specific jobs.

Costs of safety section (whatever that may be) which cannot be definitely allocated to specific jobs.

The Government, of course, could have kept its books in either one of two ways. It could have maintained two separate records, one of the cost of the various jobs done and one of the cost of maintaining the Government's offices, in other words, the overhead. It could, on the other hand, as it did in fact do, have combined the two accounts, totaling the cost of all the jobs done and totaling all overhead, figuring what ratio or percentage the one bore to the other, and adding to the cost of each job that percentage of the overhead.

Thus, if the overhead in a given year amounted to $50,000.00 and if, during that year, there were ten jobs done costing $100,000.00 making a total of $1,000,000.00 for the year, the overhead would be five percent of the total

job cost and to the cost of each job would be added five per cent, or $5,000.00, the ten jobs absorbing the $50,000.00. This procedure would, by the end of the year, as the witness LaCroix phrased it, (R. 199), "clear out the overhead account", and the entire cost of operating the division offices would be charged to the jobs. This, however, would be purely a matter of bookkeeping practice, the overhead item, or percentage, being charged *not to the contractor* but *to the job.* (R. 203-4).

Suppose, now, we carry the illustration a little further.

Suppose one of the contractors defaults on his $100,000.00 job when only half of the work, or $50,000.00 of it, has been finished and suppose that the contract for the remaining $50,000.000 is re-let for $70,000.00. This will make the total cost of the job $120,000.00 instead of $100,000.00, increasing the cost of all jobs done in the division during the year to $1,020,000.00, and it will reduce the percentage applicable to each job for the absorption of the overhead to .049 (approximately) but will increase the proportion of the year's overhead chargeable to the job from five per cent of $100,000.00, or $5,000.00, to 4.9 per cent of $120,000.00, or $5,880.00.

This is precisely the thing that has been done in this case. The total Area, District, and Division Overhead of the Government has not been increased a fraction of a mill by the re-letting of the unfinished Grasser contract to Cralan but the proportion of that overhead imputable to the job has been increased by several thousand dollars purely as an arbitrary bookkeeping matter resulting from the

method of accounting followed by the Government. This does not represent in any sense any actual increase in cost to the Government but merely an increase in the proportion of overhead chargeable, *as a bookkeeping fiction*, to the *job*, but never, in any event, either in the case of an original or in the case of a re-let contract, chargeable, even fictitiously, to the contractor.

Furthermore, and still more outrageously, the Government has evidently figured the percentage, .053, (R. 206), on *the entire cost of the work done by Cralan*, not on the increased cost as compared with Grasser's contract. The Area, District, and Division Overhead on the Picayune-ville-Waterloo Levee, Item R-805-A, the first job shown on the statement embodied in the petition (R. 13-18), is $4,-825.18, which is .052966 of the payments made to Cralan ($84,330.64) plus the Job Overhead ($6,769.12), or $91,-099.76; and the same thing is true on the other Picayune-ville-Waterloo Levee job, Item R-805-B, and the Dicharry Levee job, Item L-891.

Suppose we take for illustration the case of a private individual, a man who, we will assume, is engaged in the business of buying lots and erecting dwellings on them which he offers for sale or rent. If he does this in any appreciable volume, he will have to maintain an office, for which he will have to pay rent; will have to employ a secretary or stenographer; and will have certain other expenses in the form of stationery, postage, etc. He will also, let us say, employ two or three inspectors whose business it will be to supervise the work of construction, who will be paid so much per hour, and whose fees will thus be determined by the amount of time devoted to each job.

This man lets out the work of building his houses to various contractors and, in order to determine with as much precision as possible, the cost of each particular property, he adds to the price of the lot and the contract price of the building the fee he is required to pay his inspector and any other similar items that can be definitely identified as imputable to that job. He also totals the cost of all the houses built during the year, totals all of his general office expenses, determines the percentage of the former that the latter represents, and adds that percentage to the cost of each house, thus erasing from his books all overhead costs, both specific and general, and arriving at a figure for each job which represents what the job actually cost him.

But by what process of reasoning could it be said that any of the contractors with whom he does business and to whom he agrees to pay stipulated prices for erecting his houses have anything to do with these overhead costs or with his method of handling them on his books?

Suppose one of these contractors defaults. Suppose the unfinished work at that time amounts in value to $2,000.00 out of a $5,000.00 contract and that our friend has the job completed by someone else at a cost of $2,500.00. The original contractor would, of course, owe him $500.00 but it would require pretty strong and convincing evidence to induce a court to believe that the work of inspection with the second contractor required more of the inspector's time than it would have with the first, and, in the absence of such evidence, it is absolutely certain that no recovery for this claimed additional cost would be allowed.

But if any claim for this additional "Job Overhead" would, in the absence of conclusive proof, be rejected, what can be said of the general overhead? The cost of the job under the original contract was $5,000.00 and the actual cost, after re-letting the contract, was $5,500.00. Thus, if our friend re-casts his accounts in order to apportion his general overhead more accurately, there will be imputed to the $5,500.00 job under the re-let contract a larger share of general overhead than there would have been to the $5,000.00 job under the original contract. But is it possible, as a legal concept, to imagine that he would have even the flimsiest shadow of right to demand this purely fictitious "increase" from the original contractor or his surety as part of the extra cost of completing the work?

The answer is most emphatically "No"; and, as it is with a private citizen, so must it be when the "owner" is the Government.

In the performance of any levee or other similar job for the Government, the cost of doing the work is divided into two classes, the price which the Government must pay to the contractor who undertakes the job and the Government's own expense which is itself subdivided into items allocable to the particular job, or "Job Overhead", and a proportion of the general cost of operating the Government's offices or "Area, District, and Division Overhead". The Government's own cost, consisting of the latter two items, is, of course, something with which neither the contractor nor his surety has anything to do and it cannot be conceived by the wildest flight of the imagination how either of them can owe either of these items to the Government.

Neither of them, in fact, owes the Government anything. The contractor deals with the Government as with any other individual or entity. He knows, of course, that the Government must have its own general overhead and will incur some special overhead expense in supervising his particular job, but he does not undertake to *pay* any of this. He undertakes to do the work for a specified price and the Government undertakes to *pay him* that price *in addition* to bearing its own expense. And if he defaults on his job and it becomes necessary for the Government to have another contractor complete the work, there is no more reason than in the first instance for charging him or his surety with the "Job Overhead" (except perhaps to such extent as it may have exceeded the same item incurred in connection with the original contract and then only in the event that positive affirmative proof is adduced of the amount of such excess, no attempt to do which was made here) ; and there is absolutely no reason, justification, or excuse for charging him with the "Area, District, and Division Overhead", every cent of which the Government would have to pay in any case and the amount of which is not in the remotest degree increased or affected in any way by the necessity for reletting the contract.

This item, involving the very considerable sum of $14,399.87 with five years 5% interest, was apparently given no special consideration by the Court of Appeals since no specific allusion was made to it in its opinion by the said Court, which brushed aside our most strenuous and vehement objection to it with the superficial and general phrase "The record contains substantial evidence to support the finding of damages made by the trial court".

It is impossible for us to believe that the Court consciously approved the allowance of this item and, considering the general character of the language quoted, we can only assume that the Court either overlooked it entirely or was unaware of its real nature. It amounts, however, with interest, to something like $18,000.00, which is a pretty substantial sum in any man's economy, and to approve it means the mulcting of this defendant of this very large amount for which it is no more liable than for the cost of erecting the government office building at New Orleans.

We now ask this Court, in all earnestness, whether this tribunal, the highest court in the land and our last resort in our appeal for justice, will permit the allowance of this unconscionable charge.

We ask pardon for arguing this point so fully but the rights of our client demand it.

In its declaration of policy relative to the issuance of writs of certiorari set forth in Rule 38, Paragraph 5 (b), this Court indicates that an application for a writ will be entertained—

> "Where a Circuit Court of Appeals . . . has decided an important question of general law in a way probably untenable or in conflict with the weight of authority. . . ."

We believe that there is none among the vast multitude of questions treated in the whole great framework of the law more vitally important than the simple issue whether a man shall be required to pay $18,000.00 that he does not owe and no decision of that question in a way

more flagrantly in conflict with the fundamental principles upon which the "weight of authority" is supposedly based than the arbitrary decree that he must pay it.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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September 9, 1940.